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IN THE

Supreme Court of the United States

October Term, 1953

No. 254

IN RE: CITATION OF SHERMAN K. LEVINE FOR CONTEMPT OF COURT.

RESPONDENT'S BRIEF

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Supreme Court Rules, No. 12 (1).

28 U. S. C. A. 1257 (3)

QUESTIONS PRESENTED

1. Where in a contempt of court proceeding no alleged federal question is raised until after adjudication by a state supreme court and then is raised for the first time by petition for reargument which is refused, shall the Supreme Court review the case?

2. Whether under the facts of this case the adjudication of contempt of court is substantial for review by this Court.

3. Whether the judgment of the trial judge, affirmed by the supreme court of the state, is supported by the evidence.

STATEMENT OF THE CASE

This case was a proceeding brought against Sherman K. Levine, District Attorney of Lawrence County, Pennsylvania, for contempt of court in respect to its President Judge, W. Walter Braham.

Lawrence County has two adjoining courtrooms, a President Judge (W. Walter Braham), an Additional Law Judge (John G. Lamoree), a District Attorney (Sherman K. Levine) and an Assistant District Attorney.

On November 19, 1951, the President Judge upon written petition of the District Attorney fixed two cases of the Department of Public Assistance for trial on November 30, 1951. Subsequently the District Attorney fixed a sentence court for the same day. When the time for trial arrived, the District Attorney elected to go into Court Room No. 2 and help his assistant dispose of sentences, although the Judge there presiding never ordered or requested him to do so. The President Judge sent a messenger three times to request the District Attorney to come or send some one to represent the Commonwealth in his court room. The District Attorney refused. The President Judge was obliged to try the cases alone.

Late in the morning the Assistant District Attorney came into Court Room No. 1 and later the

District Attorney. When the latter was asked why he had not furnished assistance, he retorted rudely and insolently in open court:

> "That is the way with this court, always mixing things up, everything is fixed on the same day."

The President Judge said:

> "The people of the county pay for two district attorneys and are entitled to have both court rooms covered."

The District Attorney replied:

> "The people of the county are getting their money's worth."

The District Attorney made no further explanation and no apology. On December 3, 1951, the President Judge called the District Attorney to his chambers and made a statement which was taken down by the court stenographer, transcribed, and a copy given the District Attorney. In this statement the President Judge, after expressing regret concerning the occasion, gave the District Attorney the option of accepting a reprimand for his conduct or of standing trial for contempt. The District Attorney replied by a letter demanding trial by the Additional Law Judge and accusing the President Judge of instituting the proceedings to cover up some dereliction of his own which the District Attorney said was then under investigation by his office.

Formal charges of contempt were made and tried by the President Judge. At trial he placed on the record some of the circumstances and stated

the precise language used by the District Attorney. The defense of the District Attorney was heard in full and argument had. The District Attorney was found guilty and directed to pay the sum of one hundred ($100.00) dollars for the use of the county and costs. The judgment was affirmed by the Superior Court and by the Supreme Court of Pennsylvania.

There was no suggestion that a federal question was involved until after affirmance by the Supreme Court of Pennsylvania. A motion for reargument was then made by the District Attorney and was refused without opinion.

The opinion of the Pennsylvania Superior Court is reported in 170 Pa. Superior Ct. 579, 88 A. 2d 104, and the subsequent opinion of the Pennsylvania Supreme Court is reported in 372 Pa. 612, 95 A. 2nd 282. Thereafter a petition for reargument was filed, but refused without opinion: 372 Pa. 612, 614.

ARGUMENT

The respondent submits that the petition for writ of certiorari should be refused for the following reasons:

1. No alleged federal question was ever raised in this case until after adjudication by the state supreme court.

2. Under the facts of this case the adjudication of contempt of court is not substantial for review by this Court.

3. The judgment of the trial judge, affirmed by the supreme court of the state, is supported by the evidence.

I. NO FEDERAL QUESTION PROPERLY RAISED FOR REVIEW BY THIS COURT.

No federal question was raised in the trial court. Likewise no federal question was raised in the respective appeals to the Superior Court and the Supreme Court of Pennsylvania. No federal question was argued orally or in the briefs. The present petitioner attempted to raise for the first time a federal question in a petition for rehearing, after judgment. The petition was refused.

This is conceded by the petitioner. For he states, at page 2, as the alleged basis of jurisdiction for review by this Court:

> "The decision sought to be reviewed is the refusal of the Supreme Court of Pennsylvania to grant a petition for reargument, filed February 24, 1953, and denied, per curiam, March 24, 1953, in which petition, Petitioner specially set up and claimed under said Fourteenth Amendment of the Constitution of the United States his right not to be deprived by the Commonwealth of Pennsylvania and the majority opinion of the Supreme Court of Pennsylvania of his liberty and property without due process of law."

The attempt to inject a federal question at this stage is too late and the petition for writ of certiorari should therefore be dismissed.

Certiorari to review a decision of the Court of last resort of a state will not be allowed under Section 3 of the statute 28 U. S. C. A. 1257 (3) unless the federal question has been raised and ruled in the trial court and in the appellate court below. This is the plain requirement of Rule 12 (1) of the Supreme Court. As stated by Mr. Justice Frankfurter in Beauharnis v. Illinois, 343 U. S. 250, 96 Law Ed. 919, 931:

> "The benefits of hypothetical defenses, never raised below or pressed upon us are not to be invoked in the abstract."

This is true of an attack on a state statute: Charleston Federal Savings & Loan Association v. Alderson, 324 U. S. 192, 89 Law Ed. 856, 860; Wilson et al v. Cook Commissioner, 337 U. S. 474, 90 Law

Ed. 793, 801. The same rule applies to alleged errors in the application of principles of general law; the question must have been raised and decided in the court below: Sawyard v. Denny et al, 158 U. S. 180, 39 Law Ed. 941, 942.

As to raising the federal question for the first time in a petition for rehearing the rule is well stated in Loeber v. Schroeder, Admr., 149 U. S. 580, 37 Law Ed. 856, 859, as follows:

> "It is also well settled by the decisions of this court that the attempt to raise for the first time a Federal question in a petition for rehearing, after judgment, comes too late. Texas v. P. R. Co. v. Southern Pac. R. Co., 137 U. S. 48, 54, 34 Law Ed. 614, 616; Butler v. Gage, 138 U. S. 52, 34 Law. Ed. 869; Winona & St. P. R. Co. v. Plainview, 143 U. S. 462, 35 Law Ed. 225; and Bushnell v. Crooke Min. & Smelt. Co. ante, p. 610." (Last citation is 148 U. S. 682, 37 Law Ed. 610.)

A federal question first presented in a petition for rehearing to the highest court of the state after a final decision of that court, and there denied without opinion, is raised too late for judicial review by the Supreme Court of the United States. In addition to above cases see:

Herndon v. Georgia, 295 U. S. 441, 443, 79 Law Ed. 1530, 1532, 55 S. Ct. 794;

Godchaux Co. v. Estopinal, 251 U. S. 179, 181, 64 L. Ed. 213, 214, 40 S. Ct. 116;

Rooker v. Fidelity Trust Co., 261 U. S. 114, 117, 67 L. Ed. 556, 563, 43 S. Ct. 288;

Bowe v. Scott, 233 U. S. 658, 663, 58 L. Ed. 1141, 1144, 34 S. Ct. 769.

In the Bowe case above the Supreme Court mentions this proposition as "elementary".

The petition should therefore be dismissed for want of jurisdiction.

II. ADJUDICATION OF CONTEMPT OF COURT IN THIS CASE IS NOT SUBSTANTIAL FOR REVIEW BY THIS COURT.

The alleged Federal question stated in the petition before the Court is not substantial. It is not substantial because the Supreme Court has previously decided all the essential principles involved: Zucht v. King et al, 260 U. S. 174, 67 Law Ed. 194, 198.

The point most complained of is the employment by the Judge of his own knowledge as to what happened in his own court room before his face. Yet this has long been part of the law of contempt. The withdrawal of the defendant from the court room where he had been guilty of contempt of court and the making of an order without hearing and in his absence were sustained in Ex parte Terry, 128 U. S. 225, 32 Law Ed. 405. In Sacher v. United States, 343 U. S. 1, 96 Law Ed. 717, the trial judge employed his personal knowledge of contumelious conduct, occurring in his presence during nine months of trial, to sentence for contempt the attorneys who had tried the case. In MacInnis v. United States, 191 Federal 2nd 157,

United States v. Greed, 176 Federal 2nd 169, and United States v. Hall, 176 Federal 2nd 163, it was held that sentence for contempt committed in the presence of the Court need not be immediate. It was sustained in these cases, although imposed several days later and without trial. In each of these cases certiorari was refused by the Supreme Court.

In the case at bar the trial judge stated at the outset that no evidence was needed as to matters occurring in the presence of the Court. He employed his own knowledge supplemented by testimony as to matters outside his own personal knowledge.

The inherent power of a trial judge to adjudicate a person guilty of contempt of court in open court cannot be challenged. Nor is this power lost by judicious reflection and consideration.

The merits of this case were carefully reviewed by the highest court of Pennsylvania and the judgment was affirmed.

It is submitted that there is nothing substantial for review by this Court and the petition for writ of certiorari should accordingly be dismissed.

III. THE JUDGMENT IS SUPPORTED BY THE EVIDENCE.

The fact which the District Attorney seeks most earnestly to suppress is that on November 19th the Department of Public Assistance cases were fixed

for trial on November 30 upon his own motion. (91a).

Hence the constantly repeated idea that the trial judge required the District Attorney to abandon his work in Court Room No. 2 is false. Rather, the process of the court had gone out in the Department of Public Assistance cases, the parties were in court, and the District Attorney was merely asked to perform his part in the legal procedure which he had instituted. The District Attorney attempted to contend that the President Judge had indicated his intention to be out of town on November 27 through 30 inclusive. This was erroneous; he admits being twice in court before the President Judge on November 28. (120a)

When he did elect to come into court, the District Attorney had no word of regret or apology. He denounced the court for fixing business contrary to his wishes. The idea that two district attorneys were necessary in Court Room No. 2 is unfounded. On the occasion in question pleas were received and sentences fixed in twenty-three cases, all misdemeanors. Nineteen defendants were involved. Included were a large number of cases of drunken driving and vagrancy in which a standard sentence was imposed. There had never been a custom of shutting down one court room so another might finish early. Both courts were substantially through at noon. There were no cases for trial at the ensuing term. There was no reason for humiliating and belaboring the court in the name of speed. A court is a deliberative body. In no sense was the court calendar overloaded.

All of the District Attorney's witnesses said they failed to hear the initial question of the Judge and the District Attorney's insolent and defiant answer. Mr. Vance heard it in part. The Court heard and understood that its authority was being boldly challenged. It did not matter whether the District Attorney had caused business to be fixed at a certain time; he would come when he felt like it. The absence of any expression of regret at any time and the letter which the District Attorney wrote on December 4, 1951, (129a-130a) are decisive. This was not just incivility, it was contempt of court.

The key to this case is found in the letter just mentioned. The President Judge having had no word of inquiry, regret or apology, summoned the District Attorney to his office and told him that his conduct had amounted to contempt. He proposed to cite the District Attorney for contempt, but allowed the alternative of "some words of public instruction, warning and reproof" as an alternative (103a-105a).

Most significant was the District Attorney's reaction. He at once adopted the attitude which is all too common among attorneys for defendants in criminal court—try the prosecutor. Accordingly he set out to try the court. He began with a charge that the Judge falsely and maliciously trumped up the charges in question to cover some dereliction of his own. There was the implied threat that the Judge would proceed at his peril. This language contained in the District Attorney's letter of December 4, 1951, (129a-130a) as follows:

> "Your statements regarding the friendly relations between us are insincere and do not impress me. I believe the fact that your conduct in certain matters is now under investigation by my office had no little to do in motivating your present action."

With the sending of this letter the Court had no alternative but to proceed. The letter itself was an act of contempt: Cooks v. United States, 267 U. S. 517, 69 Law Ed. 767; Blodgett v. Superior Court, 121 Cal., 290 Pac. 293, 72 A. L. R. 482; in re McCarty, 29 Nev. 110, 85 Pac. 352; Ex parte Earman, Fla. 95 So. 735, 31 A. L. R. 1226. The charges so recklessly made in the letter were utterly unfounded, relating to the Judge's part in attempting to preserve for posterity a beautiful valley.

The attitude of bitter denunciation of the trial judge has continued throughout the case. In the statement of questions involved there is persistent assumption that it was the Court which instituted an attack on the District Attorney. The talk is all about the office of District Attorney and the Judge who made an attack on it. Nothing about the District Attorney who refused to honor the case which he himself had caused to be assigned and who denounced, ridiculed and ultimately threatened the Judge who tried to hold him to his duty.

The whole argument of the petitioner pivots on the contention that the evidence does not support a finding of the contempt language. It is suggested by that argument that the trial judge should be vacuous to what transpired before his own eyes and within his hearing. Inherent in court

contempt cases is the personal knowledge of the trial judge as to what transpired. At the outset the trial judge stated on the record the remarks complained of. Several witnesses called by the District Attorney admitted no knowledge of the beginning of the colloquy. The personal knowledge of the Judge was not extinguished.

If ever there was a case where the power was cautiously observed, it is this case. For the trial judge, instead of hasty and immediate action, deferred for more considered judgment. The conduct of the District Attorney was reviewed by the appellate judges of Pennsylvania and the judgment of contempt was affirmed.

The judgment is supported by the record and there was no lack of due process.

CONCLUSION

The petition for writ of certiorari should be dismissed,,

Respectfully submitted,

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